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NO. 82-256

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

-vs-

DAVID KERK LONG,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Michigan Supreme Court correctly decided that a warrantless search of a traffic violator's car violated the state and federal Constitutions.

II. Whether the Michigan Supreme Court correctly decided that evidence discovered in a search undertaken because of evidence obtained by unlawful police action should have been suppressed.

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OPINIONS BELOW

The Michigan Court of Appeals opinion (Petition App. 35) is reported at 94 MichApp 338; 288 NW2d 629 (1979). The Michigan Supreme Court judgment (Petition App. 8) is reported at 413 Mich 461; 320 NW2d 866 (1982).

JURISDICTION

The Michigan Supreme Court judgment was entered June 14, 1982. The Petition for a Writ of Certiorari was filed August 13, 1982. The jurisdiction of this Court is invoked under 28 USC §1257(3).

STATEMENT OF FACTS

On August 25, 1977, two Barry County, Michigan, Sheriff's deputies pursued a speeding car (PT 4, 16-18; Tr 126-8*). After a short pursuit, the car swerved and stopped with its front in a shallow ditch, its back on the roadway and its driver's side toward the deputies (PT 4, Tr 129-30, 145, 164-5). David Long, the only occupant of the car, left the driver's seat and met the deputies at the rear of the car (PT 5, 19, 46; Tr 130, 145-6). Although Long appeared unsteady, disoriented and "under the influence of something" (PT 20; Tr 181), he was cooperative at all times (PT 19; Tr 181-2) and produced his driver's license after being asked for it twice (PT 5, 47; Tr 130-1).

Long was asked for the registration and proof of insurance of the car (PT 47; Tr 131). Without speaking, he walked toward the open driver's door (PT 47; Tr 131). The deputies then saw, and retrieved from the floor of the car, a large, closed folding knife (PT 6, 26, 48; Tr 132-3, 165-6). No claim was made that the "buck" knife was contraband. The Defendant was not charged with a weapons offense (PT 35; Tr 151; *People* v *Long*, 413 Mich 461, 469 n.1; 320 NW2d 866, 868 n.1 (1982); see MCLA 750.227; MSA 28.424). Long was frisked after the knife was seized. Although no weapons were found (PT 6, 23, 48-9, 159, 167), one of the deputies then held him while the other searched the interior of the car, ostensibly for weapons (PT 6, 27; Tr 133). The car's registration may have been found at this time (PT 50). The deputies said they searched the interior of the car for weapons because they were going to permit Long to get in to retrieve the registration (PT 8, 28). They thought the registration was in the glove box (PT 34). They acknowledged that no search would have been needed if they had asked Long where the registration was and retrieved it themselves (PT 34).

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* "PT" references are to pages of the transcript of the preliminary examination. "Tr" references are to pages of the trial transcript.

Although tools, including a hammer and screwdriver, were scattered about the "messy" car (PT 21; Tr 147, 181), the search for weapons was concentrated on a leather object which protruded slightly from beneath a folded-down armrest (PT 6-7; Tr 133-4, 148). Deputy Howell lifted the armrest and removed a leather, pocket-sized wallet. He removed the wallet from the car and opened it to take out a plastic bag containing marijuana (PT 6-7; Tr 134-5, 139, 168, 173).

Long was arrested for possession of marijuana (PT 8; Tr 139). Deputy Howell then searched the car for other contraband (Tr 140). The Defendant did not have a key to the trunk of the car, (PT 9, 132; Tr 140), so one of the deputies forced the keyless latch with his pocket knife and found two bags containing approximately 75 pounds of marijuana (PT 10, 13, 32-3; Tr 140-1, 144).

Deputy Howell searched the trunk to see if there was contraband in it and because he had a *personal* policy of checking for valuables in cars that he intended to impound, testifying that "we do not have an inventory search" in the Sheriff's Department (PT 10-11; Tr 141).

The car was towed to the Sheriff's garage where it was left overnight with the marijuana in it (PT 14, 51-2; Tr 142-3, 176-7). No written inventory was produced at trial and the deputies could not testify precisely about the car's contents (PT 22; Tr 146-7, 182).

Long moved at various stages of the proceedings to suppress the marijuana obtained in the searches of the car. The prosecution never attempted to justify these searches as "probable cause" searches. *People* v *Long*, 413 Mich 461, 472, 481 n.2; 320 NW2d 866, 869-70, 873 n.2 (1982). It sought to justify the initial search of the vehicle as a protective search under *Terry* v *Ohio*, 392 US 1 (1968), and the search of the trunk as an inventory search under *South Dakota* v *Opperman*, 428 US 364 (1976).

Long was convicted of possession of marijuana and appealed. His conviction was affirmed by the Michigan Court of Appeals, which called the issues close and "factually oriented." *People* v *Long*, 94 MichApp 338, 341; 288 NW2d 629, 630 (1979). The Michigan Supreme Court reversed the conviction because the facts of this case did not come within the narrowly-drawn exceptions to the warrant requirements of the state and federal Constitutions. Since the trunk search was made because of evidence found in the search of the car's interior, the evidence found in the trunk was suppressed as "fruit of the poisonous tree." *Wong Sun* v *US*, 371 US 471 (1963).

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT DECISION IS SUPPORTED BY AN ADEQUATE STATE GROUND.

The Michigan Supreme Court grounded its decision on both the state and federal Constitutions. See *People* v *Long*, 413 Mich 461, 471 n.4, 473; 320 NW2d 866, 869 n.4, 870 (1982). Michigan has looked to federal case authority in its analysis of state constitutional questions. However, because of differences in the wording of the state and federal constitutional prohibitions of unreasonable searches and seizures, the Michigan Supreme Court has "imposed a higher standard under the state provision than the federal when the item seized is not one within the proviso of the third sentence of art 1, §11" of the state Constitution. *People* v *Secrest*, 413 Mich 521, 525; 321 NW2d 368, 369 (1982). See also *People* v *Nabers*, 103 MichApp 354, 375; 303 NW2d 205, 214 rev'd on other grounds 411 Mich 1046; 309 NW2d 187 (1981); *People* v *Wallach*, 110 MichApp 37, 70 n.8; 312 NW2d 387, 403 n.8 (1981); and *People* v *Chernowas*, 111 MichApp 1, 4; 314 NW2d 505, 507 (1981).

The proviso of the third section of art 1, §11 of the Michigan Constitution prohibits application of the exclusionary rule to, among other things:

"Any narcotic drug . . . seized by a peace officer outside the curtilage of any dwelling house . . ."

People v *Moore*, 391 Mich 426; 216 NW2d 770 (1974), cited at page 5 of the Petition, deals with this proviso. Neither the proviso nor *Moore* applies to this case. Michigan has a statutory definition of "narcotic drug" which does not include marijuana. See MCLA 333.7107; MSA 14.15(7107).

Examples of the greater protection afforded by the Michigan Constitution abound.

The Michigan Constitution prohibits warrantless participant monitoring of telephone conversations. *People* v *Beavers*, 393 Mich 554; 227 NW2d 511, cert den 423 US 878 (1975). Warrantless participant monitoring is permitted under the federal Constitution. *US* v *White*, 401 US 745 (1971).

The subjective test of entrapment is followed under the U.S. Constitution. *US* v *Russell*, 411 US 423 (1973). Michigan follows the objective test. *People* v *Turner*, 390 Mich 7, 19; 210 NW2d 336 (1973).

The Michigan Constitution's double jeopardy provision bars prosecutions by "dual sovereignties" for the same crime. *People* v *Cooper*, 398 Mich 450; 247 NW2d 866 (1976). Compare *Bartkus* v *Illinois*, 359 US 121 (1959).

Even the Attorney General has acknowledged that Michigan law affords greater protection to the accused than the U.S. Constitution. He has recently been quoted as saying that Michigan's legal system:

"is more restrictive than the federal system in virtually every important area of criminal law and criminal procedure." See Appendix 2a.

The Michigan Supreme Court decision is based on an adequate state ground. The state Constitution was men-

tioned expressly as one basis of the opinion. If the Attorney General thought the decision was incorrect, he should have moved for rehearing pursuant to GCR 1963, 864.4. The Petition for Certiorari should be denied.

II. THE MICHIGAN SUPREME COURT DECISION APPLIED WELL-ESTABLISHED LEGAL PRINCIPLES TO PARTICULAR FACTS.

The Michigan Supreme Court did not repudiate *Terry* v *Ohio*, 392 US 1 (1968). Its decision involved the application of generally agreed upon legal principles to the unique facts of this case. Its decision is consistent with *Terry* and other authority. Unless this Court perceives its function to be the parsing for the possibility of error every appellate opinion applying its precedents, there is no occasion for further review.

Terry v *Ohio*, 392 US 1, 25-6, 30-1 (1968), authorized "pat-down searches" for weapons in the absence of probable cause, saying that such a search must "be strictly circumscribed by the exigencies which justify its initiation." In very limited circumstances, a police officer is "entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing" of a detainee to discover weapons which might be used to assault the officer.

> "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra* v *Illinois*, 444 US 85, 93 (1979).

> "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway* v *New York*, 442 US 200, 210 (1979).

> "In the case of a self-protective search for weapons, [an officer] must be able to point to particular facts from

which he reasonably inferred that the individual was armed and dangerous." *Sibron* v *New York*, 392 US 40, 64 (1968).

In this case, the deputies were not able to point to particular facts from which they inferred that Long was either armed or dangerous. They never testified that they believed he was armed or dangerous. He was cooperative at all times (PT 19; Tr 181-2). He was never suspected of anything more serious than a traffic offense (PT 24). The folding knife which prompted the initial patdown was not illegal. See *People* v *Iverson*, 34 MichApp 519, 524; 191 NW2d 745, 747-8 (1971). Although one deputy was "concerned" about Long, his concern was not particularized and he admitted that Long had given the deputies no reason to draw their weapons or to take him to the patrol car (PT 27-8). The patdown search of Long showed that he was not armed (PT 23, 48-9; Tr 147, 159, 167). The deputies had less reason to believe that he was a danger to them after the patdown search than when the knife was first seen.

The Defendant, at the time of the search of the car, was outside it being detained by one of the deputies (PT 27; Tr 167), who would not have permitted him to get into the car while he was watching (PT 26; Tr 183).

Although the deputies claimed that their search was for weapons, they ignored screwdrivers, hammers and other legal, but potentially dangerous, objects (PT 22; Tr 182-3).

The deputies conducted a "generalized cursory search for weapons," extending beyond the "outer clothing" of the Defendant in the absence of particular facts inferring any exigency or danger. The Michigan Supreme Court's holding that this was unlawful was simply adherence to this Court's repeated admonitions to "jealously and carefully" draw exceptions to the warrant requirement and to limit warrantless searches to "the exigencies of the situation that made that course imperative." *Coolidge* v *New Hampshire*,

403 US 443, 455 (1971); *Terry* v *Ohio*, 392 US 1, 25-6 (1968). Further review by this Court is unwarranted.

None of the cases cited by the Attorney General in the Petition for Certiorari require a different result. As noted by the Michigan Supreme Court at 413 Mich 472 n.6, 320 NW2d 869 n.6, *Robbins* v *California*, 453 US 420 (1981) "is inapposite as the court in that case addressed the propriety of an automobile search conducted pursuant to probable cause." Since the officers never claimed that they were searching for contraband or that they had probable cause to arrest the Defendant, the only possible justification for looking inside the car was the "protective search" exception to the warrant requirement of the state and federal Constitutions.[1]

The holding of the case is consistent with *Canal Zone* v *Bender*, 573 F2d 1329 (5th Cir. 1978). The investigating officers in that case never indicated any reason to believe that the Defendants were armed or dangerous. They searched the interior of the car without first "patting down" the Defendants. In *US* v *Rainone*, 586 F2d 1132, 1136 (7th Cir. 1978), cert den 440 US 980 (1979), the Court characterized these actions as completely defeating "the protective rationale of *Terry*." Cf. Sibron v. New York, 392 US 40, 65 (1968), *People* v *Rosales*, 406 Mich 624; 281 NW2d 126 (1979), cert den 444 US 1025 (1980).

In this case, the deputies claimed to be searching for weapons, but they ignored tools like hammers and screwdrivers that could easily have been used as weapons,

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[1] Page 3 of the Petition for Certiorari hints that the deputies believed the Defendant had an open container of intoxicants illegally in the car. The deputies never said they searched Long's car because they thought it contained open intoxicants. A considerable extrapolation of the record is required to justify the conclusion that the deputies though Long's car contained open intoxicants (see App. 1a) Even if the deputies had probable cause to believe that Long was committing this misdemeanor, their search of the car without a warrant would have been unlawful under Michigan law. See *People* v *Lolley*, 113 MichApp 557, 317 NW2d 342, lv den 413 Mich 919 (1982).

thereby defeating the protective rationale of *Terry*. They said they were going to let the Defendant in the car to get his registration, but one of them testified that at least some of the papers they were looking for may have been found before the search. Defendant Long, like the Defendants in *Bender*, was outside the car during the search, under the control of the investigating officers, offering no threat to them, and not in a position to retrieve anything from the car. Simply put, as in *Bender*, *Sibron*, and *Rosales*, there is adequate reason to question the existence of the protective motive for the search required by *Terry*.

US v *Powless*, 546 F2d 792 (8th Cir.), cert den 430 US 910 (1977) held that investigating officers who had been given a reliable tip that the occupants of a particularly-described van were armed and dangerous had probable cause to search the van. A gun was discovered "in plain view" when one of the officers looked for the vehicle registration number of the van. The Court's discussion of extending a "frisk" of the Defendants to the van is dictum.

In *US* v *Rainone*, 586 F2d 1132 (7th Cir. 1978), cert den 440 US 980 (1979), the Defendants were reasonably believed to present "some danger" related to an ongoing, violent intra-family dispute. The Court specifically found that it was reasonable to believe that the Defendants were armed. There was not a lone defendant suspected of a traffic offense, as in this case. The Court held that "in the circumstances presented by this case . . ." it was proper for the investigating officers to conduct a limited search of the car's interior. The Court noted that the officer removed from the car only those items that appeared to be weapons. Deputy Howell concentrated his attentions on a very unweaponlike object. Since the facts of this case are not the same as those in *Rainone*, there is no conflict between them.

III. THERE IS NO DISPUTED APPLICATION OF FEDERAL PRECEDENT CONCERNING THE SEARCH OF THE TRUNK.

A. The Michigan Supreme Court Did Not Reach The Question Of Whether The Trunk Search Was A Proper Inventory Search Under *South Dakota* v *Opperman*.

The second issue framed by Petitioner includes the question of whether the seizure of marijuana from the trunk of Defendant's car violated *South Dakota* v *Opperman*, 428 US 364 (1976). The Michigan Supreme Court never reached this question. *South Dakota* v *Opperman* is not discussed in the majority opinion. Rather, the Court held that since there would have been no further search of the car had the search of the interior not uncovered contraband, the "fruit of the poisonous tree" doctrine of *Wong Sun* v *US*, 371 US 471 (1963) applied. The State has not argued that the Court incorrectly applied *Wong Sun*.

The decision to impound the car was not made until after the Defendant was arrested for possession of the marijuana found on the front seat (TR 139). As concurruing Justice Moody pointed out, the prosecution never sought to justify the trunk search under the "automobile exception," as a search incident to an arrest or as a search based on probable cause. 413 Mich 461, 481 n.2; 320 NW2d 866, 873 n.2. Since the impoundment and subsequent trunk search were a direct result of an unlawful search, *Wong Sun* was correctly applied.

What the Michigan Supreme Court would have done if *Wong Sun* had not applied is hypothetical. It would waste this Court's resources to review a concurring opinion in a Michigan Supreme Court case on a point not reached by the majority.

B. The Propriety Of The Trunk Search Involves Controlling Issues Of State Law.

If the Michigan Supreme Court had reached the merits of the trunk search, its decision would have been governed by controlling state precedent. Arrest for a traffic offense would not, under Michigan law, have justified searching the Defendant or impounding his car, particularly without first having given him the opportunity to post bond. *People* v *Dixon*, 392 Mich 691; 222 NW2d 749 (1974); *People* v *7th District Judge*, 55 MichApp 471, 476; 222 NW2d 778, 781 (1974); *People* v *Garcia*, 81 MichApp 260; 265 NW2d 115 (1978) and *People* v *Cavitt*, 86 MichApp 59; 272 NW2d 196 (1978).

The fact that the Defendant had not produced registration did not give the officers right to suspect that the vehicle was stolen or to search or impound it. *People* v *7th District Judge*, supra; *People* v *Marshall*, 23 MichApp 376, 379; 181 NW2d 578 (1970).

Even if the deputies had probable cause to believe that Long had committed a misdemeanor (possession of marijuana), they would not, under Michigan law, have been able to search his car without first securing a warrant, since the misdemeanor was not committed in their presence. *People* v *Lolley*, 113 MichApp 567; 317 NW2d 342, lv den 413 Mich 919 (1982).

Michigan has not adopted the rule of *US* v *Ross*, _____ US _____; 102 S Ct 2157; 72 LEd2d 572 (1982). Under Michigan precedent, discovery of marijuana in the interior of the car would not have justified a search of the trunk. *People* v *Hilber*, 403 Mich 312, 329; 269 NW2d 159 (1978). There was no lawful basis for impounding the car under Michigan law. The Writ of Certiorari should be denied.

C. The Deputies' Search Of Long's Car Trunk Was Not A Valid Inventory Search.

Deputy Howell testified that his Department did not do inventory searches. He said he had a personal policy of checking for valuables (PT 10-11). The police had absolutely secure storage facilities for the vehicle available, i.e. the basement of the police garage (Tr 176-7). These facts alone take this case outside the rationale of *South Dakota* v *Opperman*, 428 US 364, 376 (1976), which upheld inventory searches "following standard police procedures." *US* v *Chadwick*, 433 US 1, 13 (1977) analyzed the rationale for inventory searches saying:

> "Absolute secure storage facilities may not be available, and the size and inherent mobility of a vehicle makes it susceptible to theft or intrusion by vandals."

In short, the factors that led this Court to uphold the inventory search in *South Dakota* v *Opperman* are absent here. Even if the Michigan Supreme Court had reached this question, it would have been justified in finding the search unlawful.

CONCLUSION

The decision of the Michigan Supreme Court has an adequate basis in state law. It involves the application of well-established principles to unique facts. Some of the issues sought to be reviewed were not reached by the Michigan Supreme Court. Had they been reached, they would have been controlled by applicable state law. The State has never sought to justify the searches in this case on any grounds other than those adequately addressed in the lower courts. Recent decisions of this Court dealing with other exceptions to the warrant requirement are not applicable. The Petition for Certiorari ought to be denied.

Respectfully submitted,

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Preliminary Examination

TESTIMONY OF GEORGE HOWELL (CROSS)

Q. What would you say? How would you describe him as far as his conduct?

A. He appeared to be under the influence of something.

Q. Okay, anything besides that?

A. You're asking me for opinion, my opinion?

Q. Pardon?

A. In my opinion he acted scared.

Q. He what?

A. I said in my opinion he acted scared.

Q. He acted scared? Well, don't most people when they are stopped by a police officer at twelve o five act a little nervous and scared?

A. No sir.

Q. You don't think so?

A. No sir.

Q. I see, you've never had that experience I take it?

A. Yes I have at times. Usually they have open intox in the car or something like that.

KALAMAZOO GAZETTE

Thursday, July 29, 1982 PAGE D-5

Michigan 'more restrictive' in criminal law

MACKINAC ISLAND (UPI) — Attorney General Frank Kelley today urged Michigan prosecutors to support federal and state moves to correct the "out of kilter" balance between the rights of the society and accused criminals.

"All of us involved in law enforcement are concerned about and committed to protection of the civil liberties of the accused," Kelley said.

Kelley said Michigan's legal system "is more restrictive than the federal system in virtually every important area of criminal law and criminal procedure.